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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 1104

E. R. BORGMEIER,

Petitioner,

vs.

HELEN N. FLEMING, WILLIAM J. NEWMAN, JR., MARGARET N. WALSH, RICHARD P. NEWMAN, JOSEPHINE N. KRUG, ADELAIDE LOIACANO AND WILLIAM McKAVIS, A MINOR, BY HELEN N. FLEMING, HIS NEXT FRIEND,

Respondents,

LAKE DELTON DEVELOPMENT COMPANY, A WISCONSIN CORPORATION, RALPH M. HINES, JAMES H. HILL, SR., HILMER C. AMUNDSON AND HENRY C. TITUS,

Respondents,

AND

JAMES H. HILL, JR., MILLIE M. RISLEY, FRANCES HINES AND A. B. BATTY,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

FRANK M. COYNE,
Attorney for Plaintiffs-Respondents,

ARTHUR WICKHAM,
Attorney for Lake Delton Development Company, Ralph M. Hines, James H. Hill, Sr., and Henry C. Titus, Defendants-Respondents, and James H. Hill, Jr., Interpleaded Defendant, Respondent, and

RAY M. STROUD,
1 W. Main Street, Madison, Wisconsin,
Attorneys of Record for All Above Named Respondents.

THE DUNHOFF-WARREN PRINTING COMPANY, CHICAGO

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OCTOBER TERM, 1956.

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HELEN N. FLEMING, WILLIAM J. NEWMAN, JR., MARGARET N. WALSH, RICHARD P. NEWMAN, JOSEPHINE N. KRUG, ADELAIDE LOIACANO AND WILLIAM MCKAVIS, A MINOR, BY HELEN N. FLEMING, HIS NEXT FRIEND,

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JAMES H. HILL, JR., MILLIE M. RISLEY, FRANCES HINES AND A. B. BATTY,

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ORDER AND OPINION BELOW

Because of petitioner's failure and refusal to offer any evidence to support her claim for an alleged attorney's lien, the United States District Court ordered that funds deposited by defendants with the clerk of court be paid

to aid for and on behalf of the plaintiffs." On petitioner's appeal the Court of Appeals directed that the cause be remanded "with directions to proceed to determining the merits of appellant's claim for lien after the issues pertaining thereto have been properly joined." (Appendix B, p. 10a.) Thereafter this petition was filed.

QUESTIONS PRESENTED

I. Should this Court in the exercise of its discretion grant the writ because:

a. There has been a showing of the required "imperative public importance" and thus, although no judgment has been rendered by the Court of Appeals, the matter under Rule 20 is such as "to require immediate settlement in this Court"?

b. There are "special and important reasons," as required by Rule 19, for the issuance of the writ?

c. Some of the instances mentioned in Rule 19, 1(b) here exist?

II. Did petitioner by filing her lien in the District Court and by taking her appeal, which could be perfected only by a party, thereby appear and subject herself to the jurisdiction of the court?

ADDITIONAL STATEMENT

The defendants-respondents and the interpleaded defendant-respondent, James H. Hill, Jr., were served with copies of petitioner's lien. (Pet., p. 3a.) But to protect themselves they caused to be inserted in the stipulation for settlement a provision that the payments to be made by them be paid to the clerk of court. (R. 70.) Prompt notice of the settlement was given petitioner. (R. 73.) It is undisputed that petitioner, although advised as to deposits with the clerk, did nothing to prove or protect her alleged lien, until she filed it with the clerk on December 13, 1955. (Pet., p. 2a.)

The plaintiffs-respondents take the position that petitioner had no lien. (R. 131, 132.) Their position is also that if she ever had a lien, such was lost or waived by reason of her abandonment of the litigation and her refusal to prosecute the claim. (R. 81, 126.) So far as any retaining lien may be concerned their position is that she exercised this lien right and retained all such papers as came into her possession (R. 22, 26, 43, 69), and that by reason thereof such is not a matter involved herein. Petitioner claims also that she has a lien by reason of the provisions of the Wisconsin statutes, section 256.362. (Pet., p. 11.) Such is also disputed. The court of appeals in directing the district court "to proceed to determine the merits of appellant's claims" (Appendix B, p. 10a) probably contemplated that the issues then to be framed should cover the questions as to whether the statute makes provision for such an alleged lien, as to what was the reasonable value of petitioner's services, as to whether there was in fact any such lien and, if so, as to whether it was waived or abandoned.

ARGUMENT.

WRIT OF CERTIORARI MAY BE REFUSED PURSUANT TO RULE 20. NO JUDGMENT OF COURT OF APPEALS HAS BEEN RENDERED AND CASE IS NOT OF REQUIRED "IMPERATIVE PUBLIC IMPORTANCE."

Rule 20 of this court (omitting citations there set forth) provides:

> "*Certiorari to a court of appeals before judgment.* A writ of certiorari to review a case pending in a court of appeals, before judgment is given in such court, will be granted only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate processes and to require immediate settlement in this court."

The court of appeals (241 F. 2d 865, 867, Appendix B, p. 10a) set forth in its mandate as follows:

> "The order of November 17, 1955, from which the appeal is taken, is declared void and vacated and the cause remanded to the district court with directions to proceed to determine the merits of appellant's claim for lien after the issues pertaining thereto have been properly joined."

The court in this connection may be interested in examining *Cleveland C. C. & St. L. Ry. Co.* v. *Henry Admx.*, 290 U. S. 627, and *Bruce, Admr., et al.* v. *Tobin*, 245 U. S. 18. In each, a petition for a writ of certiorari to a state court was denied for want of a final judgment. In the *Henry* case a new trial had been ordered by the Supreme Court of Missouri. In the *Bruce* case a new trial had been ordered by the Supreme Court of South Dakota. It is true that in these actions it was necessary in order for a writ of certiorari to be granted that a final judgment be

entered. In the matter at bar, however, there was no judgment whatsoever, either final or otherwise. The cause was remanded for trial.

There furthermore has been no "showing that the case is of such imperative public importance as to justify the deviation from normal appellate processes and to require immediate settlement in this court." Petitioner's claim that she had a lien on the funds deposited with the clerk of the district court is certainly not a matter of "imperative public importance" such as justified the issuance of writs of certiorari in the decisions set forth in said rule. See particularly *United States* v. *Bankers Trust Co.*, 294 U. S. 240; *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330; and *United States* v. *United Mine Workers*, 330 U. S. 258.

RULE 19 UNDER FACTS SET FORTH IN PETITION AFFORDS NO PROPER BASIS FOR ISSUANCE OF WRIT.

Section 1 of this rule in part reads:

> "1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:"

Instances are then set forth when the writ may be issued.

Petitioner does not state what are the "special and important reasons" for the issuance of the writ or as to why this court in its "sound judicial discretion" should take such action at this stage of the litigation. An attempt rather is made to bring the matter within some of the instances where possibly a writ may be granted. It thus may be advisable to comment on such instances as are

mentioned in Rule 19, 1(b) and are mentioned in the petition.

If it is assumed that the writ should be issued considering only the provisions subsection (b) of Section 1 of the rule, there is, we submit, grave doubt as to whether any proper showing has been made. Purported reasons are set forth at various places throughout the petition. It is claimed (Pet., p. 17) that the court of appeals found that the trial court did not have jurisdiction, but then remanded the cause to determine the merits as to petitioner's attorney's lien. When petitioner states that the court of appeals found that the trial court did not have jurisdiction, she was undoubtedly referring to the decision on her application for writs of mandamus and prohibition. Such decision was, of course, not binding upon the defendants. They were not parties to that proceeding and were not even permitted to file a brief *amicus curiae*. Certainly the second decision indicated conclusively that the court of appeals was of the opinion that it did have jurisdiction.

In any event, such is not one of the reasons enumerated in subsection (b) of Rule 19.

It is contended also (Pet., p. 21) that the remanding for a trial upon the merits before Judge Stone, "in view of his repeated conduct in suppressing said lien, in view of petitioner's continuous insistence on her jurisdictional claims, and her refusal to waive the same, brings the cause within the supervisory provisions of Rule 19 (b)." This is not one of the reasons set forth in this subsection. Judge Stone's position was unquestionably that petitioner should be afforded every opportunity of litigating her claimed lien and further that the matter should be disposed of without any further undue delay. The papers and documents which petitioner examined pursuant to the court's order covered a period from 1926 to 1943. (Pet., p. 6.) A complaint was filed on May 21, 1953. (Pet., p. 3.) An examination of the

original complaint will indicate that it was based upon a resulting trust. When, however, petitioner was advised that the applicable Wisconsin statute enacted over ninety years prior to the institution of the action had outlawed resulting trusts, she then with his consent amended her complaint to make claim upon a constructive trust claimed to arise because of fraud of the defendants. It is admitted in the petition (p. 4) that the conveyances to the defendant company were in accordance with an order of the United States District Court of the Northern District of Illinois, Eastern Division, in the bankruptcy proceeding involving the father of some of the plaintiffs and the grandfather of some of the others. This is material because had the defendants or any of them been confidential employees of plaintiffs' said ancestor insofar as this sale was concerned or had the defendant company been his "solely-owned" corporation, or had he any interest therein, Judge Holly, who made the order for the conveyances, would certainly not have taken any such action. It is said also that petitioner was compelled to attend numerous pre-trial examinations at Madison and Baraboo (Pet., p. 5), but they were all depositions which petitioner conducted. (R. 108.) There were no depositions taken by the defendants. It is also set forth in the petition (p. 6) that petitioner was discharged prior to October 21, 1954. Whether she was discharged or not, there had been no steps taken to bring the action on for trial for a period of over sixteen months. The situation was certainly one where these ancient transactions carried on under the supervision of the United States District Court in the bankruptcy proceeding should have been disposed of without undue delay. The defendants, like other people, do not live forever, and it was necessary that they be permitted to testify. As a matter of fact, the defendant Amundson is now dead; the interpleaded defendant, A. B. Batty, whom petitioner caused to be made an interpleaded

defendant, is also dead. It requires no stretch of the imagination to understand as to why defendants under such circumstances and because of the age and condition of other defendants finally agreed to pay the sum of $32,500.00. But during all of these transactions there was no possible basis for claiming that Judge Stone was acting improperly and in fact was not granting every request she made.

When defendants insisted that the money which was to be paid in settlement should be paid to the clerk of the court and such provision was set forth in the settlement agreement, such was done pursuant to authorities set forth in an annotation at 117 A. L. R. 983. It was done for the purpose of affording petitioner the opportunity of making claim for the amounts said to be due her and of enforcing her alleged lien. This settlement incidentally was not made until after the case had been called for trial and was twenty-eight months after the complaint prepared by petitioner had been filed by her. (Pet., p. 9.)

Petitioner admits that she received notice that she "may take such steps as she may desire to enforce any lien which she may claim or assert herein." (Pet., p. 9.) This notice was given promptly. (R. 412.) Petitioner refused to do anything to assert her alleged lien. Steps were taken for the purpose of having her appear and show cause as to why there should not be an adjudication with respect to her claim in this regard. There has never been any contention made by or on behalf of petitioner that she was not actually advised as to what the situation was in this regard. Her claim is rather that the notice mailed by the clerk of the district court, which was sent to her at her then residence by registered mail, was never actually received by her. (Pet., p. 16.) The situation is unusual in that the trial court was attempting repeatedly to prevail upon her to assert any lien, if she had one, but she on the other hand was doing everything to stay out of court ex-

cept on certain occasions to enter her special appearances. The record in fact indicates that the trial court apparently was more concerned about protecting petitioner's rights than she was herself. In any event, the remanding of the matter for trial to Judge Stone is, we submit, not a reason for the issuance of the writ pursuant to subsection (b).

It is further claimed that "the court of appeals has also chosen to ignore its own statements appearing at pages 2 and 3 of its opinion here * * *." Petitioner is undoubtedly referring to the first decision, that rendered on her application for a writ of mandamus and a writ of prohibition. Defendants, however, were not a party to such proceeding and, as above set forth, were not even permitted to file a brief *amicus curiae*. In any event, such is not one of the instances covered by subsection (b) of Rule 19.

There are, however, matters set forth in the petition which might seem to be covered by subsection (b). It is claimed (Pet., p. 16) that the court of appeals has "chosen to ignore the statutory requirements and practice of the State of Wisconsin." The only Wisconsin decision which petitioner cites in support of this proposition is *State ex rel. Cronkhite v. Belden*, 193 Wis. 145, 211 N. W. 916. This decision involved the validity of service upon a nonresident motorist. He had been ordered to appear before a master in the State of Illinois. It was claimed that his appearance there constituted a general appearance in an action instituted in Wisconsin. The court held that such appearance before the Illinois master was not a general appearance in the Wisconsin action. The sentence quoted on page 26 of the petition was a statement made with respect to such contention. That the court did not intend to limit the instances in which there could be a general appearance is indicated by the phrase, that such could be made "no doubt in other ways." The court held, as indicated by the fol

lowing statement, which is set forth immediately following the sentence quoted in the petition, "here the appearance was not in the action and did not amount to a general appearance."

The "other ways" in which there may be a general appearance are rather numerous. Of interest in this connection is the decision in *Bestor v. Inter-County Fair*, 135 Wis. 339, 115 N. W. 809. The following statement is set forth at page 341:

> "The mere fact that the defendant stated that he appeared specially to object to the jurisdiction of the court will not protect him from the consequences of a general appearance, if the proceedings taken by him show that he appeared for any purpose consistent with jurisdiction. In the case before us the defendant moved the court to amend the return of the officer to the summons to conform to the facts. This motion was inconsistent with want of jurisdiction of the court over the person of defendant. The court could not grant the motion without jurisdiction of the person and the subject matter. The asking of the relief prayed for in the motion, whether granted or not, was a submission by defendant to the jurisdiction of the court and a waiver of all jurisdictional defects. We are therefore of opinion that the motion to amend the return and process of the court amounted to a general appearance in the action."

In view of petitioner's appeal, the following statement in *Rix v. Sprague C. M. Co.*, 157 Wis. 572, 147 N. W. 1001, at page 573, is likewise of interest:

> "* * * an appeal from a judgment constitutes a general appearance. *Barnum v. Fitzpatrick*, 11 Wis. 81; *Ruthe v. G. B. & M. R. Co.*, 37 Wis. 344; *Washburn v. Washburn W. Co.*, 120 Wis. 575, 98 N. W. 539."

It is claimed also (Pet., p. 16) that the court of appeals "has chosen to ignore the practice sanctioned by this court * * *." This contention might more expeditiously be con-

cred under the following heading and will be commented upon there. In any event, petitioner has not shown "special and important reasons" for the issuance of the writ and also has totally disregarded the provisions of Rule 20 of this court.

PETITION BY FILING HER LIEN BECAME A PARTY TO THE ACTION.

The filing of a claim for an attorney's lien constitutes, we believe, a general appearance. In *Alexander* v. *Hillman*, 296 U. S. 222, 80 L. Ed. 192, 56 S. Ct. 204, claims were filed by nonresident individuals in a suit where the court had appointed receivers. In response to the claims the receivers filed in the same court an ancillary bill in which they set up counterclaims for the value of assets claimed to have been fraudulently converted by these claimants. Upon being served by mail with copies of the ancillary bill and an order directing them to plead, claimants appeared specially and moved to quash. This court, however, held that the trial court had jurisdiction of these nonresident claimants. The following statement appears at page 241:

> "By presenting their claims respondents subjected themselves to all the consequences that attach to an appearance, § 51 to the contrary notwithstanding. See *General Electric Co.* v. *Marcel Co.*, 287 U. S. 430, 435."

It would not seem to be necessary, as stated in the petition (p. 16), that there be any motion to file a lien. The two authorities there set forth, *Central R. & Banking Co. of Georgia* v. *Pettus*, 113 U. S. 116, and *Patrick* v. *Leach*, 17 Fed. 476, do not hold that there must be a motion or any other formality with respect to the filing of a lien. No reason, furthermore, is suggested as to why there should be any such formality.

It cannot seriously be doubted that the filing in this instance was for the purpose of setting forth what petitioner's lien was so that no action adverse to her could be taken with respect to such claimed lien. The record was already clear and conclusive that she had made claim for an attorney's lien. Such was recognized at the time of the settlement effected, whereby notice was to be given to her so that she "may take such steps as she may desire to enforce any lien which she may claim or assert herein." (Pet., p. 9). That she asserted a lien is also indicated by the order from which petitioner perfected her appeal dated November 17, 1955. It provided that the sums deposited with the court were to be "released to the plaintiffs through their attorneys free from any lien of Attorney Eleanor Borgmeier, Esq.". (Pet., p. 40.).

That the petitioner should not be heard to say that she was not a party to the appeal and thus that the court did not have jurisdiction of her is indicated by the very fact that she perfected an appeal. Rule 73 (a) of the Federal Rules of Civil Procedure in part provides:

> "A party may appeal from a judgment by filing with the district court a notice of appeal."

It is stated in Moore's Federal Practice, Vol. 7, page 3126, Sec. 73.04:

> "The first sentence in the second paragraph of amended Rule 73(a) provides that 'A *party* may appeal from a judgment by filing with the district court a notice of appeal.'
>
> "Only a person who has become a party in the court below and who is aggrieved by the judgment or order can appeal therefrom."

Petitioner insisted that she be permitted to appeal. Although Judge Stone was apparently of the opinion that she had no right to do so and took what steps he could to

prevail upon her to prove her claim, she obtained from the Court of Appeals a Writ of Mandamus and a Writ of Prohibition and was thus allowed to appeal, *Borgmeyer v. Stone*, as Judge etc., 233 F. 2d 818. As a result of her own action, she assumed the position of a party. Under such circumstance, it would seem that she could not now be heard to say that she was not a party or that the court did not have jurisdiction over her person. Thus irrespective of the filing by her of her lien, which could have been done only for the purpose of asking the court to protect her rights with respect to it, the District Court; we submit, should be permitted to pass on the merits of her claim and terminate the protracted litigation.

CONCLUSION.

For the above reasons the petition may properly and should be denied.

Respectfully submitted,

RAY M. STROUD,
Attorney of record for all respondents appearing herein.

FRANK M. COYNE,
Attorney for plaintiffs-respondents.

ARTHUR WICKHAM,
Attorney for defendants-respondents and interpleaded defendant respondent appearing herein.